IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-545

UNITED AIR LINES, INC.,

Petitioner,

vs.

LIANE BUIX McDONALD,

Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STUART BERNSTEIN,
JAMES W. GLADDEN, JR.,
SUSAN S. SHER,
231 South LaSalle Street,
Chicago, Illinois 60604,
Counsel for Petitioner.

Of Counsel:
MAYER, BROWN & PLATT,
231 South LaSalle Street,
Chicago, Illinois 60604.

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1. Respondent appears now to concede that under *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538 (1974), the limitations period for putative class members begins to run upon denial of class status by the trial court. But respondent attempts to distinguish between the running of the limitations period when one seeks to intervene to assert an individual claim and when one seeks to intervene to appeal the class determination. Respondent suggests that although the limitations period had run for one purpose, it did not for the other. Resp. Br. 5.

This is a unique theory of jurisdiction. Under it, if the intervenors in *American Pipe* had delayed four more days before attempting intervention and thus had been beyond the limitations period, their claims could nonetheless have been revived if they had only waited until after final judgment. *American Pipe* makes no sense unless it means that after class denial,

putative class members must act within the remaining limitations period to protect their interests or are thereafter foreclosed. Respondent's assertion that the intervenors there "acquiesced" (Resp. Br. 5) in the class determination is meaningless—the intervenors there had no other choice but intervention if they wished to assert their claims. *See* 3B Moore's Federal Practice (1975 Supp.) ¶ 23.90, n. 11.

2. Respondent's reference to *United Air Lines* v. *Evans*, 534 F. 2d 1247 (7th Cir. 1976), in which this Court granted certiorari on November 2, 1976 (76-333), dramatically illustrates the mischief in respondent's position and in the decision below. Ms. Evans, who resigned in February 1968 pursuant to United's then existing no-marriage rule, claims in her own case seniority rights and back pay from the time of her rehire by United in 1972. Respondent alleges that Evans is also a member of the class in this case (Resp. Br. 5 n. 3). In respondent's view, whether *Evans* is ultimately reversed or affirmed is of no matter. For in either event, all Ms. Evans need do, according to respondent, is join the class in this case and then claim back pay from 1968 and restoration of seniority rights. Ms. Evans pursued her own remedy, and whether she acted timely or not is one of the questions to be decided by this Court. If respondent is correct, Ms. Evans can start all over again in this case—and *Evans* will have concluded nothing.[1]

3. Respondent sat back from September, 1968, when her employment terminated to October, 1975. She claims she was aware of all proceedings during the intervening period, but took

1. We do not agree that Ms. Evans is part of any class. The decision below sheds no light on composition of class and ignored the fact that the trial court denied class for lack of numerosity—the same basis of denial as in *American Pipe*. The issue here is whether the trial court's determination should have been reached by the court below. Respondent attempts to cloud the issue by characterizing the trial court's 1972 decision as "erroneous." As the dissent noted, "Since . . . the timeliness issue is dispositive, I have not deemed it necessary to advert to the other issues raised on this appeal." (Pet. App. A25.)

no action because she relied on the named plaintiffs to appeal the denial of class action. She now asserts the named plaintiffs did not acquiesce in the denial of class until after final judgment and that petitioner settled with plaintiffs and intervenors without assurance that they would not appeal the adverse class determination after judgment. Respondent is in error. The final order was an agreed order of dismissal with prejudice from which plaintiff and intervenors could not appeal, as plaintiff's counsel admitted in open court.[2]

Respondent could have acted at any time up to June, 1973; she offers no valid reason why she did not. Had she attempted and been denied intervention then, that decision would have been immediately appealable (see Pet. 5, Dissenting Op., Pet. App. A24). That she claims reliance on what she thought the named plaintiffs might have done is as irrelevant as was the belief of the claimant in *Johnson* v. *Railway Express Agency*, 421 U. S. 454, 466 (1975), that he could rely on his assertion of a Title VII claim to suspend the running of the limitations period on his § 1981 claim. The obligation of putative class members to act timely after denial of class status and the possibility that named plaintiffs might but need not appeal the denial are as separate and independent as were the Title VII and § 1981 claims in *Johnson*. Respondent, indeed, "has slept on her rights."[3] 421 U. S. at 466.

2. The cases cited by respondent in support of intervention after judgment (Resp. Br. 8) are not relevant here. These cases arose out of circumstances where the trial court has permitted intervention for purposes of appealing final judgment where the intervenors were bound by the judgment. Respondent McDonald is not bound by the final order in this case. Her claim was barred by her own inaction after denial of class status, not by the final judgment which determined the rights only of named plaintiffs and those who timely intervened. See *Pearson* v. *Ecological Science Corp.*, 522 F. 2d 171, 178 (5th Cir. 1975), cert. den. 96 Sup. Ct. 1508 (1976).

3. "We note further that the motion for class action certification was denied by the district court on March 13, 1973, and the stipulation of settlement was entered into on February 22, 1974; thus,

(Continued on next page)

4. Respondent claims petitioner does not challenge the correctness of the decision below under Rule 24 (Resp. Br. 4, n. 2). Respondent is in error. We noted in the Petition that Rule 24 cannot enlarge the statute of limitations, but allows for the discretion of the trial court to deny intervention even within the statutory period (Pet. 9). The majority decision below applied Rule 24 to expand the limitations period without discussing the abuse of discretion standard which would be applicable if the respondent had in fact acted within the statutory period. See opinion of Justice Blackmun in *American Pipe*, 414 U. S. at 561-62.

Respondent attempted to intervene 5½ years after this action was started, 3 years after denial of class status and 7 years after her employment was terminated. In denying intervention, the trial judge observed that "litigation must end." *American Pipe* held that "the commencement of the class action . . . suspended the running of the limitation period only during the pendency of the motion to strip the suit of its class character." 414 U. S. at 561. This litigation ended for respondent no later than June 1973—2½ years before her first overt act in October 1975.

Respectfully submitted,

STUART BERNSTEIN,
JAMES W. GLADDEN, JR.,
SUSAN S. SHER,
231 South LaSalle Street,
Chicago, Illinois 60604,
Counsel for Petitioner.

Of Counsel:
MAYER, BROWN & PLATT,
231 South LaSalle Street,
Chicago, Illinois 60604,
(312) 782-0600.

November 24, 1976.

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any party who failed to seek intervention in the consolidated action between those two dates can blame no one but himself if his action is now barred." *Pearson* v. *Ecological Science Corp.*, 522 F. 2d 171, 178 (5th Cir. 1975), *cert. den.* 96 Sup. Ct. 1508 (1976).